

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WEST CONSHOHOCKEN BOROUGH POLICE :
OFFICERS :
 :
v. : Case No. PF-C-20-16-E
 :
WEST CONSHOHOCKEN BOROUGH :

FINAL ORDER

On June 8, 2021, the West Conshohocken Borough Police Officers (Union) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) challenging a Proposed Decision and Order (PDO) issued on May 20, 2021. In the PDO, the Board's Hearing Examiner concluded that West Conshohocken Borough (Borough) did not violate Section 6(1)(a) or (e) of the Pennsylvania Labor Relations Act (PLRA), as read *in pari materia* with Act 111 of 1968, when the Borough's Chief of Police issued a memo requiring requests for shift exchanges to be submitted to him for initial approval before being approved by the Patrol Sergeants. The Borough filed a response to the exceptions on June 28, 2021.

The facts of this case are summarized as follows. Michael Sinclair has been the Borough's Chief of Police for 11 years. (FF 3). Sergeant John Bianchini has been a patrol supervisor for 5 years and a police officer for the Borough for 35 years. (FF 4). Sergeant Brian Raskiewicz has been a patrol supervisor for 5 years and a police officer for the Borough for 25 years. (FF 5).

The parties are governed by a collective bargaining agreement (CBA) effective January 1, 2013 through December 31, 2015, an interest arbitration award effective January 1, 2016 through December 31, 2019, and a Memorandum of Agreement (MOA) effective January 1, 2020 through December 31, 2023. (FF 22). Article II, Section III of the parties' 2013-2015 CBA provides in relevant part, as follows:

The scheduling of shifts is provided by the Chief of Police and the Mayor.

Effective January 4, 2010, the Department shall commence operating under 12-hour shifts[.] The Chief of Police shall determine the starting and ending time for those shifts, as well as the rotation thereof. Upon the change to 12-hour shifts, all leave time, including personal time, bereavement time, holidays, sick time, vacation time and compensatory time within the contract which is expressed in "days" shall be converted to hours within each "day" under the contract being converted to 8 hours.

(FF 23). The MOA provides that "[s]hift scheduling shall remain as it currently exists." The parties understood this language to mean that the rotating shift schedule was to remain the same. (FF 18).

The Borough's Police Department has 11 full time police officers who work rotating shifts with each rotation lasting two weeks. (FF 6). There are 7 shifts in a two-week rotation including six 12 hour shifts and one 8 hour shift occurring on a Sunday. In the first week of rotation, the officers work four 12 hour shifts and an 8 hour shift on Sunday. The officers then work two 12 hour shifts in the second week of rotation. (FF 9). The officers do not pick their shift schedule. (FF 7).

Sergeants Bianchini and Raskiewicz develop the shift schedule for the officers at least 6 months in advance through a computer program that generates the schedule by automatically rotating the officers through a shift rotation of two weeks on day shift and two weeks on night shift. Chief Sinclair has not been involved in setting up the schedule for the officers for the past 5 years. (FF 7). However, Chief Sinclair remains in control of the scheduling because he is ultimately in charge of all personnel matters including scheduling, exchanging shifts and days off. (FF 10).

Shift exchanges among officers have been permitted for approximately 40 years. Sometime around 2009 or 2010, the Department started using a form for officers to submit requests for shift exchanges, vacation, sick and other leave requests. (FF 11). An officer submits the shift exchange request form to a Patrol Sergeant who then places a copy in Chief Sinclair's mailbox. (FF 12).

Chief Sinclair has always reviewed and approved all shift exchange requests that he received, which were typically one or two shift exchange requests per year. Before his February 13, 2020 memo, Chief Sinclair's review and approval of shift exchange requests was always after the Patrol Sergeants' review and approval. Chief Sinclair never saw shift exchange requests for more than one or two days prior to early 2020. (FF 13). Sergeant Raskiewicz also stated that, prior to 2020, officers did not seek to exchange large blocks of shifts. (FF 15).

On January 21, 2020, Officers Evangelist and Webster submitted a shift exchange request for 5 consecutive days. This was the first request in the Department for that many shift exchanges. (FF 14). The January 21, 2020 shift exchange request concerned Chief Sinclair because he had never seen a shift exchange request for 5 shifts. (FF 15). Chief Sinclair thought it was an anomaly to exchange that many shifts and, therefore, he did not take immediate action after receiving a copy of the January 21, 2020 shift exchange request. (FF 15, FF 16). Chief Sinclair ultimately approved the January 21, 2020 shift exchange request because he knew that Officer Webster had family issues with a new baby. (FF 17).

On February 5, 2020, Officer Pagliaro submitted a shift exchange request seeking to exchange 7 shifts, a full two week shift rotation, with Officer Carlin, which would give Officer Pagliaro four weeks on day shift and Officer Carlin four weeks on night shift. Chief Sinclair did not receive a copy of this shift exchange request and learned about the request when he reviewed the written posted schedule indicating the shift exchange on it. Chief Sinclair then asked Sergeant Raskiewicz about the February 5, 2020 request and was provided a copy of the request. (FF 19). Chief Sinclair permitted Officers Pagliaro and Carlin to exchange shifts for the first week of their exchange because Sergeant Raskiewicz had already approved it. However, Chief Sinclair directed Sergeant Raskiewicz to put Officers Pagliaro and Carlin back on their scheduled shift for their second week thereby approving only 5 of the 7 requested days. (FF 28).

Chief Sinclair had never received a 7 day shift exchange request prior to the February 5, 2020 request submitted by Officer Pagliaro. Upon discovering the February 5, 2020 shift exchange request, Chief Sinclair spoke to Sergeant Raskiewicz about his concerns regarding the officers keeping their shift rotations in compliance with the MOA. (FF 20). In Chief Sinclair's view, the MOA between the parties provided that the rotating shift schedule would remain the same and by exchanging as many as 5 or 7 consecutive days, the officers were effectively removing themselves from the rotation and scheduling themselves for steady day or night shifts. (FF 16). Chief Sinclair did not want to set a new precedent for block shift exchanges. (FF 20).

On or about February 10, 2020, Sergeant Raskiewicz informed Chief Sinclair that certain officers were going to request shift exchanges every other week in effect creating a steady shift for those officers. Chief Sinclair believed that this violated the MOA, which preserved the rotating shift schedule from the 2013-2015 CBA. (FF 21). On February 13, 2020, Chief Sinclair issued a memo to Sergeants Bianchini and Raskiewicz in response to the January 21, 2020 and February 5, 2020 shift exchange requests. (FF 25). The first 2 paragraphs of Chief Sinclair's memo outline the facts surrounding the January 21, 2020 and February 5, 2020 shift exchange requests. Chief Sinclair's memo further provides, in relevant part, as follows:

3. The Collective Bargaining Agreement between the Borough and the Officers provides that the Chief of Police shall determine the starting and ending times of the shifts and the rotation thereof.

4. Although I recognize that, on occasion, members have traded [or] an individual must trade a separate shift in order to accommodate a personal issue, officers have changed shifts. However, my concern is that, based upon the above changes and the discussions surrounding them, that the intent of this switch is to effectuate a "permanent" shift for certain officers or something very similar to it.

5. As members of the Officers' bargaining team are aware, the Officers had proposed a permanent shift, which was not agreed to by the parties and was not included in the collective bargaining agreement.

6. When I questioned you [Sergeants Bianchini and Raskiewicz] about the whole tour being changed in essence creating a steady shift for two members of the department, you both alluded to the fact that they can change their shifts, as long as they submit the shift request(s). You also contended that they are only changing the shift every two weeks and are not asking for steady shifts. However, the result of what has occurred is that officers are working a steady shift in spite of the fact that the contract does not provide for this.

7. In light of the above, I want to remind you that shift swapping cannot be used to effectuate a

permanent shift for any officer. In addition, copies of all requests for shift changes should be provided to me for approval before they are approved by you until further notice.

(FF 26).

Chief Sinclair stated that the purpose of the memo was to ensure that the Sergeants brought the requests for shift exchanges to him to discuss the reasons for the shift exchanges before approving or denying the request. Chief Sinclair further stated that the memo only requires the Sergeants to bring a shift exchange request to him before approval when the request is for 5 or more days, and not for a shift exchange request for 1 or 2 days. Prior to 2020, officers seeking shift exchanges did not have to provide a reason to exchange 1 or 2 shifts. Chief Sinclair stated that the past practice for smaller blocks of shift exchanges had not changed because his February 13, 2020 memo only applies to shift exchange requests for 5 or more days. (FF 27). It is only because in early 2020 the officers began attempting to use shift exchanges to avoid contractual shift rotation that Chief Sinclair wanted to be notified of the exchange requests in advance of approval. (FF 29).

On February 17, 2020, Officers Webster and Evangelist submitted a shift exchange request for 5 consecutive days. Sergeant Bianchini denied the request per Chief Sinclair's memo. It was the first time that Sergeant Bianchini denied a shift exchange request. (FF 30).

On March 9, 2020, Officer Carlin submitted a shift exchange request to exchange shifts with Officer Pagliaro from March 9, 2020 through March 23, 2020. On April 6, 2020, Officer Carlin submitted another shift exchange request to exchange shifts from April 6, 2020 through April 20, 2020 with Officer Pagliaro. Chief Sinclair stated that he did not receive a copy of Officer Carlin's shift exchange requests and, therefore, he did not deny them. Officer Carlin's shift exchange did not occur on those dates because Sergeant Raskiewicz did not receive a response from Chief Sinclair. (FF 31).

On July 19, 2020, Officers Webster and Evangelist requested a shift exchange for 5 consecutive days. Sergeant Bianchini discussed the request with Chief Sinclair, indicating that Officer Webster needed to be home while a contractor was at his home. Chief Sinclair approved the 5 day shift exchange due to the stated reasons of Officer Webster. (FF 32).

The Union filed its Charge of Unfair Labor Practices on March 17, 2020, alleging that the Borough violated Section 6(1)(a) and (e) of the PLRA when Chief Sinclair issued a memo requiring all shift exchange requests to be submitted to him for initial approval contrary to the practice of submitting those requests to the Patrol Sergeants first for approval. A hearing was held before the Board's Hearing Examiner on November 13, 2020, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

The Hearing Examiner concluded in the PDO that Chief Sinclair did not change the past practice concerning shift exchanges, stating as follows:

The substantial, competent evidence is clear and uncontradicted that the past practice of permitting

officers to exchange shifts was limited in scope and frequency of use. Officers periodically requested to exchange 1 or 2 shifts at a time a few times per year, and the Chief always approved those requests after the Sergeants. Although the Sergeants have historically done all the scheduling and first-level shift-exchange approvals for the past 5 years, the Chief regularly and consistently exercised managerial approval in following up on the Sergeants regarding scheduling and shift exchanges. However, in January 2020, that all changed when bargaining unit officers began requesting large blocks of shift exchanges which the Chief and the Sergeants had never before approved. Approval of these large blocks of shift exchanges was not a past practice, and the Chief was within his managerial rights to require prior approval from him before such large shift-exchange requests were granted. Chief Sinclair credibly testified that he could approve such large blocks of exchanges in the future for good reason and that he would continue to approve and permit Sergeants to approve smaller requests as a matter of course, consistent with the past practice.

(PDO at 8). Accordingly, the Hearing Examiner held that the Borough did not violate its duty to bargain under Section 6(1)(a) or (e) of the PLRA, rescinded the complaint and dismissed the Charge of Unfair Labor Practices.

The Association initially alleges in its exceptions that the Hearing Examiner erred in making various findings of fact. Specifically, the Union asserts that the Hearing Examiner's findings that Chief Sinclair would review all shift exchange requests and always approved them (FF 12, FF 13), that his approval of shift exchange requests occurred after the Patrol Sergeants' review and approval making two levels of approval (FF 13), and that his February 13, 2020 memo only applies to shift exchanges for 5 or more days (FF 27) are not supported by substantial evidence. For purposes of the exceptions, the Hearing Examiner's Findings of Fact will be sustained by the Board where there is substantial evidence in the record to support the finding. Pennsylvania State Rangers Association v. Commonwealth of Pennsylvania, Department of Conservation and Natural Resources, 45 PPER 1 (Final Order, 2013). Substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." PLRB v. Kaufman Department Stores, 29 A.2d 90 (Pa. 1942).

Further, it is the function of the hearing examiner, who is able to view the witnesses' testimony first-hand, to determine the credibility of the witnesses and weigh the probative value of the evidence presented at the hearing. North Wales Borough Police Department v. North Wales Borough, 38 PPER 181 (Final Order, 2007); E.B. Jermyn Lodge No. 2 of the FOP v. City of Scranton, 38 PPER 104 (Final Order, 2007). A hearing examiner may accept or reject the testimony of any witness in whole or in part. Limerick Township Police Officers v. Limerick Township, 36 PPER 125 (Final Order, 2005). The Board will not disturb a hearing examiner's credibility determinations absent the most compelling of circumstances. City of Scranton, *supra*.

A review of the record supports the Hearing Examiner's findings that Chief Sinclair received copies of all shift exchange requests, and reviewed

and approved them after initial approval by the Sergeants thereby creating two levels of review and approval for such requests. Further, the Hearing Examiner credited the testimony of Chief Sinclair that the February 13, 2020 memo only applied to shift exchange requests for 5 or more days. The Union has failed to demonstrate any compelling circumstances warranting reversal of the Hearing Examiner's credibility determinations and the resultant Findings of Fact are supported by substantial evidence. Accordingly, the Union's exceptions to the Hearing Examiner's factual findings are dismissed.

The Union further alleges that the Hearing Examiner erred in concluding that Chief Sinclair did not change the practice concerning shift exchange requests. In particular, the Union asserts that the Patrol Sergeants, and not Chief Sinclair, were involved in the approval process for shift exchange requests and that the requests were not restricted to a specific number of days. Where the charge alleges an established past practice concerning a mandatory subject of bargaining, the complainant has the burden of proving by substantial, credible evidence that the employer has unilaterally changed the practice. South Park Township Police Association v. PLRB, 789 A.2d 874 (Pa. Cmwlth. 2002), *appeal denied*, 806 A.2d 864 (Pa. 2002); Delaware County Lodge No. 27, Fraternal Order of Police v. PLRB, 694 A.2d 1142 (Pa. Cmwlth. 1997); Fraternal Order of Police Fort Pitt Lodge 1 v. City of Pittsburgh, 37 PPER 84 (Proposed Decision and Order, 2006). It is undisputed that an employee's hours are a mandatory subject of bargaining. 43 P.S. § 217.1. In County of Allegheny v. Allegheny County Prison Employees Independent Union, 381 A.2d 849 (Pa. 1977), the Pennsylvania Supreme Court defined a past practice as follows:

A custom or practice is not something which arises simply because a given course of conduct has been pursued by Management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type situation. It must be shown to be the *accepted* course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be *accepted* in the sense of both parties having agreed to it, but rather that it must be *accepted* in the sense of being regarded by the men involved as the *normal* and *proper* response to the underlying circumstances presented.

381 A.2d at 852 n.12 (emphasis in original). An employer commits an unfair labor practice when it makes a unilateral change in a mandatory subject of bargaining that has been established through a binding past practice. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 43 PPER 53 (Final Order, 2011); Wilkes-Barre Police Benevolent Association v. City of Wilkes-Barre, 29 PPER ¶ 29041 (Proposed Decision and Order, 1998).

Concerning the Union's contention that only the Patrol Sergeants had authority to approve shift exchange requests, the record demonstrates that Chief Sinclair is responsible for the scheduling of shifts and "shall determine the starting and ending time for those shifts, as well as rotation thereof." (Joint Exhibit 1, 2013-2015 CBA at 6). Chief Sinclair assigned the duty of creating the schedule and initial approval of shift exchange requests to the Patrol Sergeants; however, he is ultimately in charge of all

personnel matters, including scheduling and exchanging shifts. (FF 10). Indeed, the record shows that, prior to 2020, Chief Sinclair received all shift exchange requests for his review and approval after initial approval by the Patrol Sergeants. (FF 12, FF 13). In light of his duty to oversee the scheduling of shifts, Chief Sinclair issued his February 13, 2020 memo requiring shift exchange requests to be submitted to him first for approval due to his concern that the officers were attempting to avoid rotating shifts in violation of the provision in the MOA that "[s]hift scheduling shall remain as it currently exists", i.e., that the rotating shift schedule was to remain the same.¹ Therefore, after learning of the January 21, 2021 and February 5, 2021 shift exchange requests for 5 and 7 days respectively, Chief Sinclair did not want to set a new precedent for block shift exchanges and asserted his authority to ensure that the officers were not violating the MOA by utilizing shift exchanges to effectuate a steady shift for those officers.

The Union additionally asserts that the practice concerning shift exchange requests did not restrict those requests to a particular number of days and that Chief Sinclair changed that practice by limiting the number of days that the officers could exchange. However, as stated by the Hearing Examiner, the record merely establishes that, prior to 2020, shift exchange requests were limited to 1 or 2 days. At best, the Union established that shift exchanges have been utilized for up to 3 days (Union Exhibit 5), but not for requests of 5 or more days. American Federation of State, County and Municipal Employees, Council 13 v. Pennsylvania State System of Higher Education, 48 PPER 58 (Final Order, 2016) (policy only utilized to close universities for inclement weather or emergencies, and no evidence established policy utilized to provide employees with paid day off). Indeed, Sergeant Raskiewicz stated that, prior to 2020, officers did not seek to exchange large blocks of shifts. Therefore, the Union has failed to present evidence to support the finding of an established past practice concerning shift exchange requests for 5 or more days. See Commonwealth of Pennsylvania, Pennsylvania State Police, *supra* (no past practice found where the employer did not apply one-year requirement for preference transfers to officers holding positions in internal affairs division); McCandless Police Officers Association v. Town of McCandless, 21 PPER ¶ 21071 (Proposed Decision and Order, 1990) (no past practice found where employer did not consistently apply same method in computing vacation days for officers with twenty years of service); City of Pittsburgh, *supra* (no past practice found where employer did not consistently award two paid days off to officers working as field training officers).²

¹ Chief Sinclair also based his concern on Sergeant Raskiewicz's statement that certain officers were going to submit shift exchange requests every other week, which would effectively create a steady shift for those officers. (FF 21). The Union asserts that this finding is not supported by substantial evidence. However, the Hearing Examiner credited Chief Sinclair's testimony on this fact and the Union has failed to present any compelling reasons to overturn it.

² The Union asserts that the Hearing Examiner erred in failing to credit the testimony of Piero Sassu that shift exchange requests were not restricted to 1 or 2 days. However, the record shows that Mr. Sassu left employment with the Borough on December 31, 2001, (N.T. 85), prior to when Chief Sinclair became the Borough's Chief of Police in approximately 2009. (N.T. 144). Therefore, Mr. Sassu's testimony does not support how the shift exchange

Regarding whether Chief Sinclair's February 13, 2020 memo changed the practice for shift exchange requests for 1 or 2 days, Chief Sinclair credibly stated that the memo only requires the Sergeants to bring a shift exchange request to him before approval when the request is for 5 or more days, and not for a shift exchange request for 1 or 2 days. He further indicated that the purpose of the memo was to ensure that the Sergeants brought the requests for shift exchanges to him to discuss the reasons for the shift exchanges before approving or denying the request. (FF 27). Indeed, no evidence was presented that shift exchange requests for less than 5 days had been submitted and denied by Chief Sinclair after issuance of his February 13, 2020 memo. Therefore, the Union has failed to meet its burden of proving by substantial, credible evidence that the Borough unilaterally changed the alleged practice concerning shift exchange requests.³

Accordingly, the Hearing Examiner properly concluded that the Borough did not violate Section 6(1)(a) or (e) of the PLRA when Chief Sinclair issued a memo requiring requests for shift exchanges for 5 or more days to be submitted to him for initial approval. After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the West Conshohocken Borough Police Officers are hereby dismissed, and the May 20, 2021 Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Albert Mezzaroba, Member, and Gary Masino, Member this sixteenth day of November, 2021. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

practice was applied when Chief Sinclair became the Borough Chief of Police in 2009.

³ Based upon the disposition of this issue, the Board need not address the Union's remaining exceptions.